UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal No.: H-92-152 |
| | ) | (filed 6/93) |
| JOHN J. JOHNSON, | ) | |
| | ) | |
| Defendant. | ) | |

GOVERNMENT'S BRIEF IN OPPOSITION TO DEFENDANT'S REQUEST FOR REIMBURSEMENT OF DEFENDANT'S PHOTOCOPYING COSTS

The United States of America, through its undersigned attorneys, hereby submits this Memorandum Brief in Opposition to Reimbursement of Defendant's Photocopying Costs, pursuant to the Court's directive during hearing in this matter on June 21, 1993. At that time, the defendant asked the Court to order the government to pay its costs of photocopying voluminous discovery documents as a remedy for alleged injury as a result of preindictment consensual monitoring by the government.

**Defendant also based this request, in part, on the government's refusal to limit the evidence it plans to present at trial. The government will address the issue of whether this evidence should be excluded in a separate brief.**

The government respectfully reiterates its position that any sanctions for its activities in connection with the preindictment consensual monitoring of the defendant are unwarranted because the Court found no violation of his constitutional rights or of any law or rule. Furthermore, for the reasons stated below, the government respectfully submits that the

Court is not authorized, under the facts of this case, to order the government to bear the defendant's costs of photocopying discovery documents.

A. Copying costs are not authorized under Rule 16.

Fed. R. Crim. P. 16 requires only that the government "disclose . . . and make available for inspection, copying and photographing" discoverable materials. It does not require the government to photocopy those materials for the defendant, or to bear the costs of the defendant's photocopying.

In United States v. Freedman, 688 F.2d 1364, 1366 (1982), the Eleventh Circuit found that the trial court abused its discretion by ordering the government to furnish photocopies of discovery documents to the defendant because Rule 16 contains no such express requirement. The Eleventh Circuit concluded:

> Where the defendant has in no way been prohibited from inspecting the particular documents and cannot demonstrate an undue hardship from this availability, he should not be permitted to transfer the cost of his discovery request to the government especially where, as in the instant case, the defendants are not indigent.

688 F.2d at 1366-1367. See also J. Moore, MOORE'S FEDERAL PRACTICE ¶ 16.05 (1993). This ruling applies squarely to the defendant in this case, likewise nonindigent, who has had full opportunity to review and inspect all Rule 16 materials. See pp. 3-4 below. Consequently, Rule 16 does not authorize transfer of his copying costs to the government.

B. Rule 16(d)(2) sanctions are unwarranted because the government has fully complied with its discovery obligations.

Rule 16(d)(2) authorizes a number of remedies the court may impose on a party for failure to comply with Rule 16 obligations. However, none of the Rule 16(d)(2) remedies is appropriate here because the government has fully complied with its obligations under Rule 16.

Specifically, in September 1992, as soon as the court had ruled on its motions for a Garcia hearing and a protective order, the government made available to defense counsel all materials discoverable under Rule 16(a)(1)(A), (B) and (D). The government also leased office space in Houston at considerable expense, and forwarded approximately 230 boxes of records to that office to provide the defendant with local access to all grand jury documents discoverable under Rule 16. These records have been available to the defendant since October 1992. In addition, although not discovery material per se, all information in the public record subject to disclosure under Brady v. Maryland, 373 U.S. 83 (1963), and progeny was forwarded to defense counsel by the government in August 1993. The defendant has never complained about the government's lack of cooperation or failure to comply with its Rule 16 obligations, and, indeed, does not do so now. Where there has been no failure to comply with Rule 16, Rule 16(d)(2) cannot form the basis for sanctions.

The defendant here seeks a remedy for alleged government misconduct in connection with preindictment consensual monitoring, in the face of a ruling by this Court that he suffered no legally cognizable prejudice from the government's actions. Order of March 22, 1993, at 4, 6, 9, 10-11. There is no nexus between this perceived injury and the defendant's rights under Rule 16. The plain language of Rule 16(d)(2) limits the application of those sanctions available under Rule 16(d)(2) to violations of Rule 16.

** "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter other such order as it deems just under the circumstances." Fed. R. Crim. P. 16(d)(2) (emphasis added).**

The district courts in two cases cited previously by the defendant, United States v. Woodley, No. CR91-217Z (W.D. Wash. July 31, 1992), and United States v. Horn, 811 F. Supp. 739 (D.N.H. 1992) (which followed the Woodley court's opinion), both fashioned sanctions against the government for violations involving, at least in part, failure to comply with Rule 16 obligations. In these cases, which have been appealed by the government to the Ninth and First Circuits, respectively, both courts noted the relationship between the recognized injury and the sanctions imposed. Woodley, slip op. at 10 ("The sanction granted by this Court relates directly to the misconduct . . .."); Horn, 811 F. Supp. at 754 (". . . the remedy fashioned in this case relates directly to the misconduct . . .").

Because the Woodley and Horn courts found that the government violated the respective defendants' rights, and because both cases involved remedies calculated to compensate the defendants for discovery-related violations, neither of those cases constitutes authority for imposing the remedy the defendant has requested here.

C. The court should postpone decision on whether to impose copying costs on the government under its supervisory powers until after trial.

At the June 21st hearing, the Court postponed ruling on the sanctions issue until after trial. The defendant then urged the Court to use its supervisory powers to grant him interim relief by imposing copying costs on the government. This suggestion overlooks the fact that the copying costs themselves constitute a monetary sanction. No monetary award, including fees and costs, may be imposed against the United States without an express waiver of sovereign immunity by Congress. See United States v. Idaho, ex rel. Director, Dep't of Water Resources, 113 S.Ct. 1893, 1897 (1993); United States v. Chemical Foundation, 272 U.S. 1, 20-21 (1925). No statute waives sovereign immunity in criminal cases involving, as here, a nonindigent defendant

** The government acknowledges that it is required to pay certain costs for indigent defendants. See e.g. Fed. R. Crim. P. 17(b). As a general rule, however, the judicial branch bears the cost of defending indigent defendants. At any rate, the defendant in this case does not claim that he is unable to pay for his own defense.**

. Moreover, under the separation of powers principle, a federal court should exercise its supervisory authority to impose sanctions on the executive branch only when executive conduct violates the Constitution, a federal statute, a procedural rule, or some other recognized right. See United States v. Gatto, 763 F.2d 1040, 1046 (9th Cir. 1985). This Court found no such violation on the government's part.

Full treatment of this issue, which involves sovereign immunity, the separation of powers principle, and the court's supervisory powers, requires more extensive argument than the limitations the Court has set for this filing. Therefore, the government respectfully suggests that

full briefing of this issue be postponed to be raised post-trial along with other motions involving sanctions. A postponement will allow the parties' arguments and the Court's decision to be guided by further legal and factual developments related to this issue.

From a legal standpoint, this issue is currently the subject of appeal to the Ninth Circuit in the Woodley case, and to the First Circuit in the Horn case. It is likely that if and when the defendant reurges after trial, all parties and the Court may have the benefit of those appellate decisions on this issue.

From a factual standpoint, subsequent developments in this case may moot this issue. For example, in its March 22nd opinion, the Court found that "the only prejudice Johnson can demonstrate is the withdrawal of Androphy as lead counsel and Johnson's loss of confidence in Androphy." Op. at 9. In the June 21st hearing, Mr. Androphy represented to the Court that he and Ms. Lynn Liberato would be trying this case for the defense. If Mr. Androphy reinstates himself as lead counsel in this matter, whether in name or in practical effect, the defendant's claims of loss of confidence in him--and therefore his claims of injury--evaporate, and this entire issue becomes moot. It is possible that other factual developments might have a similar effect on the need to address this issue.

## Conclusion

Neither Rule 16 nor the Court's inherent supervisory power authorise the imposition of copying costs in this case. Any imposition of costs raises issues involving sovereign immunity and separation of powers. Full briefing of these issues must necessarily be extensive. Moreover, future legal and factual developments related to these issues may affect the

parties' arguments and the Court's ruling. Therefore, the government respectfully requests that full briefing of these issues be postponed along with other sanctions-related issues until after trial.

Respectfully submitted,

"/s/"
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Memorandum Brief in Opposition to Defendant's Request for Reimbursement of Defendant's Photocopying Costs and proposed order was forwarded by Certified Mail--Return Receipt Requested this 25th day of June, 1993, to:

Dan Cogdell, Esq.
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"/s/"
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Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

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| | ) | Violations: |
| JOHN J. JOHNSON, | ) | 15 U.S.C. § 1 |
| | ) | 18 U.S.C. § 1001 |
| | ) | 18 U.S.C. § 2(b) |
| Defendant. | ) | 18 U.S.C. § 371 |

ORDER

Upon consideration of the Defendant's Request for Reimbursement of Photocopying Costs and the Government's Response,

The Defendant's Motion is hereby DENIED, with leave to refile after trial.

DONE AND ENTERED THIS this ___ day of _____, 1992.

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UNITED STATES DISTRICT JUDGE